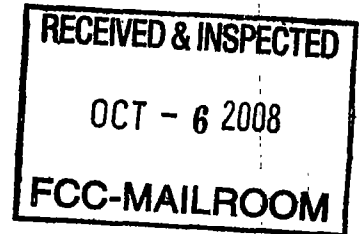


Before the  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554



In the Matter of

WT Docket No. 08-165

Petition for Declaratory Ruling to Clarify  
Provisions of Section 332(c)(7)(B) to Ensure  
Timely Siting Review and to Preempt under  
Section 253 State and Local Ordinances that  
Classify All Wireless Siting Proposals as  
Requiring a Variance

COMMENTS OF THE CITY OF APPLE VALLEY, DAKOTA COUNTY,  
MINNESOTA

These Comments are filed by the City of Apple Valley to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The City of Apple Valley also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253. Section 332(c)(7)(B)(i) provides:

(I) the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof

(i) shall not unreasonably discriminate among providers of functionally equivalent services; and

(ii) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that

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specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c) (7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in Apple Valley, Dakota County, Minnesota.

## 1. LEGAL REQUIREMENTS FOR FACILITY SITING

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings, others are required by state and local law to follow certain processes and procedures.

Local law in the City of Apple Valley requires that wireless communication towers be permitted as a conditional use, which is defined as uses generally not suitable in a particular zoning district, but which may, under some circumstances, be suitable. To ensure that the rights of the applicant and the public are preserved, the City requires that a public hearing shall be held that shall be in compliance with Section 155.339 and 155.400 of the City of Apple Valley Code of Ordinances. These requirements state that the Apple Valley Planning Commission hold at least one public hearing, affording the parties interested the opportunity to be heard, and shall give not less than ten days' notice of the

time and place of the hearing. Also, the city code requires that at least ten days before the hearing, the City Clerk shall mail an identical notice to the owners of the property and to property owners within 350 feet of the outside boundaries of the property where the conditional use is proposed.

The City of Apple Valley has a specific ordinance (Section 155.385) that deals with wireless facility siting. The ordinance was enacted October 14, 2004 and amended September 28, 2006 and addresses requirements co-location, construction, mounting on roofs, walls, and existing towers, removal of obsolete or unused towers, and standards for maximum heights and setbacks from structures.

## 2. NUMBER OF APPLICATIONS AND OUTCOMES

Please detail below the number of wireless facilities applications you have had in the past five (5) years. Provide information as to how long the process took, how that time period compares to other kinds of land use applications (i.e., residential development, big box retail, industrial development, annexations, etc.), and whether there was any "delay" in the process. If there was any delay, explain the reasons, remembering that the Commission begins with the premise that all delay is local government imposed. In particular if interactions with one or more providers skew the results for average processing times, address those situations separately.

Since 2006, Apple Valley had five (5) requests for approval of wireless telecommunications facilities. Of these, one (1) request was for collocations on an existing facility, three (3) were for new facilities on existing structures like water towers or buildings, and one (1) was for a new tower that required a conditional use permit.

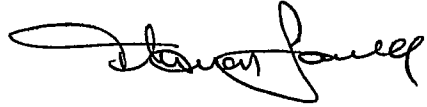
The average time between filing of an application and final decision varies on the type of request. In the case of requests for collocations on an existing facility or structures times will vary due to negotiations of terms of an agreement between the City and the applicant. With regard to the conditional use permit request, the Apple Valley City Council gave its approval within 43 days of the application. By comparison, in Apple Valley, the average time between application and final action for other land use approvals like conditional use permits is 45-60 days, with the ability by state statute to extend review of a land use request an additional 60 days.

## 3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral

process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Lawell", written in a cursive style.

Thomas Lawell, City Administrator  
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September 29, 2008